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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. _____

EDWARD FRANK SNELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, EDWARD FRANK SNELL, pursuant to Rule 53 and 18 U.S.C. §3006 A(d)(6) asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without Pre-Payment of Costs, and to proceed in forma pauperis. Petitioner was represented by appointed counsel in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: October 29, 1980

Respectfully submitted,

By Paul H. Alvarado

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Counsel for Petitioner
EDWARD FRANK SNELL

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EDWARD FRANK SNELL,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EDWARD FRANK SNELL

INDEX

TABLE OF CONTENTS

Opinions Below..... 1

Jurisdiction..... 2

Question Presented..... 2

Constitutional and Statutory Provisions..... 2

Statement of Case..... 4

Reasons for Granting Writ..... 5

Conclusion..... 7

Appendix.....Appendix "A"

TABLE OF AUTHORITIES CITED

CASES

Abbate v. United States, 359 U.S. 187 (1959)..... 5

Ashe v. Swenson, 397 U.S. 436 (1970)..... 6,7

Blockburger v. United States, 284 U.S. 299 (1932)..... 6

Petite v. United States, 361 U.S. 529 (1966)..... 5,6

Rinaldi v. United States, 434 U.S. 22 (1977)..... 5

United States v. Snell, ____F.2d_____ (9th Cir.1980).... 6

United States v. Snell, 592 F.2d 1083 (9th Cir. 1979)... 4,5

United States v. Snell, 550 F.2d 515 (9th Cir. 1977).... 4

Snell v. United States, 422 U.S. 944 (1979)..... 4,5

CONSTITUTIONAL PROVISIONS

United States Constitution, 5th Amendment..... 2

STATUTES

18 U.S.C. §371..... 2

18 U.S.C. §1951..... 3

18 U.S.C. §2113(a)..... 3

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner EDWARD FRANK SNELL prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 8, 1980, affirming the conviction of petitioner for attempted bank robbery (18 U.S.C. §2113(a)). No petition for rehearing was filed.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not as yet been published, appears as Appendix "A" to this petition. The District Court for the Northern District of California did not render an opinion.

Prior opinions of the Court of Appeals, in this case, appear at 550 F.2d 515 (9th Cir. 1977) and 592 F.2d 1083 (9th Cir. 1979).

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1980 (Appendix "A", p. 1). The jurisdiction of this Court is evoked pursuant to the provisions of 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER THE DOUBLE-JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION BARS PROSECUTION FOR ATTEMPTED BANK ROBBERY FOLLOWING A CONVICTION OF CONSPIRACY TO COMMIT BANK ROBBERY AND A REVERSAL OF THE CONVICTION OF ATTEMPTED EXTORTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States,

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, Section 371:

> If two or more persons conspire either to commit any offence against the United State, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both.
>
> If however, the offence, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

///

Title 18, United States Code, Section 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement or any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any persons or property in furtherance of a plan or purpose to do anything in violation of this section shall be find not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear or injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative of member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United State, all commerce between any point outside thereof, all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Title 18, United States Code, Section 2113(a):

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the case, custody, constrol, management, or possession of, any bank, credit union, or any savings and loan association, or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

///

STATEMENT OF CASE

Petitioner was originally charged in an indictment with attempted extortion (18 U.S.C. §1951, "Hobbs Act") and conspiracy to commit bank robbery (18 U.S.C. §371, 2113(a)). Petitioner was convicted of both counts and sentenced to concurrent terms of twenty years and five years, respectively. On appeal to the Ninth Circuit Court of Appeals, the conspiracy conviction was affirmed and the attempted extortion conviction was reversed. United States v. Snell, 550 F.2d 515 (9th Cir. 1977).

Following this reversal, petitioner was charged in a second indictment, with attempted bank robbery (18 U.S.C. §2113 (a)). The District Court for the Nothern District of California dismissed this second indictment, after a challenge on double-jeopardy and due process grounds. The Ninth Circuit Court of Appeals reversed and remanded the case to the District Court for trial. United States v. Snell, 592 F.2d 1083 (9th Cir. 1979). A petition for writ of certiorari to review the judgment of the Ninth Circuit was denied by this Court. Snell v. United States, 422 U.S. 944 (1979).

Petitioner waived jury trial, and submitted the case on the transcripts of the first trial together with oral argument. Briefly summarized, the evidence at trial showed that petitioner, one Schmidt, and an unindicted co-conspirator devised a plan to kidnap a bank manager's wife and to accompany the manager to the bank in order to obtain $150,000 in ransom money. Petitioner, along with the other co-conspirators, went to the bank manager's house on December 11, 1975, in an attempt to implement the plan, but left when the bank manager's wife came to the door with a large dog at her side. United States v. Snell, 550 F.2d 515, 517 (9th Cir. 1977). On November 19, 1979, after a bench trial on the record of the former jury trial, petitioner was

found guilty of attempted robbery and sentenced to a term of eight years. On appeal to the Ninth Circuit Court of Appeals, petitioner asserted that (1) the evidence was insufficient to support a conviction of attempted robbery, (2) his retrial violated his fifth amendment right against double jeopardy, and (3) the new indictment was defective. The Ninth Circuit Court of Appeals affirmed the conviction finding no compelling reason to alter the holding, with respect to the double jeopardy issue, of a different panel of the Ninth Circuit, in United States v. Snell, 592 F.2d 1083 (9th Cir. 1979), cert. denied, 442 U.S. 944 (1979).

REASONS FOR GRANTING THE WRIT

This case now presents a clear and complete record to facilitate the determination of the extent to which the Fifth Amendment's double jeopardy and due process clauses prohibit successive prosecutions for offenses arising out of a single transaction. The question of the applicability of the Fifth Amendment guarantees to successive prosecutions for offenses arising out of a single transaction is an important and fundamental constitutional question which should be decided on the merits. Abbate v. United States, 359 U.S. 187 (198-199)(1959), (Brennan J., separate opinion); Petite v. United States, 361 U.S. 529, 553 (1960) (Brennan J., separate opinion); Rinaldi v. United States, 434 U.S. 22, 34 (1977) (Rehnequist, J., dissenting opinion).

In the present case, petitioner has been subjected to multiple prosecutions arising out of a single transaction. First tried and convicted of attempted extortion (18 U.S.C. §1951) and conspiracy to commit bank robbery (18 U.S.C. §371, 2113(a)), petitioner was subjected to a second prosecution on charges of attempted bank robbery following a reversal of the attempted extortion conviction. The evidence presented to the trier of

fact was identical in each of the prosecutions, as petitioner waived a jury trial in the second prosecution and the matter was submitted on the record of the first trial. United States v. Snell, ___F.2d_____(9th Cir.1980), Appendix "A", p. 1.

In upholding the retrial of petitioner on the attempted robbery charge, the court below relied on the conclusion of the previous panel that "due process and the Department of Justice policy already protected defendants from multiple prosecutions." United States v. Snell, id., Appendix "A", p.4. This protection against multiple prosecutions is weak at best. The Department of Justice policy described in Petite v. United States, supra, "limits the federal prosecutor in the exercise of his discretion to initiate, or to withhold, prosecution for federal crimes." Rinaldi v. United States, 434 U.S. 22, 27 (1977) (emphasis added). The principles of due process protect a criminal from multiple prosecutions only to the extent the principles of collateral estoppel are applicable to the particular factual situation at hand. Ashe v. Swenson, 397 U.S. 436 (1970).

Under the Blockburger test, a single criminal act may lead to multiple prosecutions if it is viewed from the perspective of different statutes, so long as each statute "requires proof of a fact which the other does not...." Blockburger v. United States, 284 U.S. 299, 304 (1932). Given the abundance of modern criminal legislation, "the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening." Ashe v. Swenson, 397 U.S. 452. To require the prosecution to join at one trial all the charges against a defendant arising from a single criminal act, occurrence, episode or transaction would provide criminal defendants with a degree of protection from the abuse of the criminal process which attends multiple prosecutions. The "same transaction" test would require the consolidation in one prosecution of all

the charges arising out of a single transaction, thereby best promoting justice, economy and convenience. Ashe v. Swenson, 397 U.S. at 454.

CONCLUSION

For the foregoing reaons, it is respectfully submitted that a Writ of Certiorari should issue.

DATED: October 29, 1980

Respectfully submitted,

By Paul H. Alvarado
PAUL H. ALVARADO
Counsel for Petitioner

FILED

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RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD FRANK SNELL,

Defendant-Appellant.

No. 79-1806
CR 76-4

OPINION

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding
Argued and submitted on June 9, 1980

Before: ANDERSON and TANG, Circuit Judges, and MURRAY,* District Judge.

Per Curiam:

This is the third appeal involving the prosecution of Edward Snell for his participation in an aborted kidnap and robbery scheme. In the first appeal, United States v. Snell, 550 F.2d 515 (9th Cir. 1977), the court affirmed Snell's conviction for conspiracy to rob a federally insured bank, but reversed his conviction for attempted obstruction of commerce in violation of the Hobbs Act, 18 U.S.C. § 1951, on the ground that the conduct charged was within the exclusive coverage of 18 U.S.C. § 2113.[1] A new indictment was returned charging him with attempted robbery of a federally insured bank. Snell's pretrial appeal of his motion to dismiss the new indictment on double jeopardy grounds was rejected in United States v. Snell, 592 F.2d 1083 (9th Cir.), cert. denied, 442 U.S. 944 (1979). After a bench trial on the record of the former jury trial, Snell was found guilty of the new charge and appeals.

*Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX "A"

The facts of this case are recounted in the first Snell opinion, 550 F.2d at 517. They show that Snell and two co-conspirators planned to kidnap a bank manager and his wife, hold the wife hostage while accompanying the manager to the bank to obtain $150,000, and then kill the manager. Pursuant to that plan the three went to the manager's home and then to the bank where, from the parking lot, they observed the manager and identified his car. The other two co-conspirators also waited near the manager's house in the evening to observe him returning home.

After observing the manager's routine at his home and office, the three assembled false identifications, rubber gloves, hand guns, mace, ropes, and adhesive tape and went to the bank manager's house to carry out their plan. Spotting a Highway Patrol vehicle near the house, they postponed execution of the plan. The following day they returned to the house, again armed. Snell and one co-conspirator carried false police identification. They knocked on the door and identified themselves as policemen, but their plan to force an entry and kidnap the wife was frustrated by a Great Dane that accompanied her to the door. When one of the co-conspirators was picked up on unrelated charges and revealed the plan to the police, Snell and the third co-conspirator were arrested.

On appeal, Snell contends that (1) the evidence shows that he was in engaged in preparation rather than an attempt; (2) his retrial for attempted robbery after the Government had obtained a conviction for another offense arising out of the same transaction violated his fifth amendment right against double jeopardy; and (3) that the

new indictment was defective in form. We find no error and affirm.

I.

A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent. United States v. Mandujano, 499 F.2d 370, 373-79 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975); see United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974). The evidence here established the existence of both elements. Snell's intent was demonstrated by the plan that he devised with his co-conspirators. His intent was corroborated in a number of ways: assemblage and possession of the materials necessary to commit the crime, reconnoitering the location of the crime and the habits of the victim, and the actions taken to effectuate the plan that were frustrated only by the fortuity of a police car on one occasion and the presence of a Great Dane at the intended victim's house on another. Despite Snell's contrary assertion, this case is not meaningfully distinguishable from the factual circumstances in Bussey.

Snell argues that his conduct may constitute attempted kidnapping, but not attempted robbery. Given the nature of his scheme that made the kidnapping an integral part of the plan to rob the bank, Snell's acts taken in furtherance of the kidnapping equally evidenced his intent to rob the bank. In this respect, Snell's entry into the home of the bank manager's wife is factually precedent but so far as the total scheme is concerned is analytically little different than entry into the bank itself.

II.

Snell next contends that retrial on the attempted robbery charge violates double jeopardy. This idential argument was rejected, prior to Snell's retrial, by a panel of this court in United States v. Snell, 592 F.2d 1083 (9th Cir.), cert. denied, 442 U.S. 944 (1979). The court reasoned that the successive prosecution was not barred by double jeopardy because, under the Supreme Court's formula in Blockburger v. United States, 284 U.S. 299 (1932), attempted robbery required proof of facts different than the crimes of conspiracy to commit robbery and attempted extortion, even though all the offenses arose out of the same transaction. We find no compelling reason to alter the result reached by the first panel, and reject Snell's latest formulation of his double jeopardy argument.

The facts required to prove conspiracy and attempted extortion are plainly different from the facts necessary to commit attempted robbery. Snell argues that, although successive prosecution for different offenses may be justifiable when no conviction is obtained on the first, once a conviction has been obtained, any further prosecution for crime arising out of the same transaction amounts to harassment. The prior panel reasonably concluded, however, that due process and the Department of Justice policy already protect defendants from multiple prosecutions. There is no evidence here that the second prosecution constituted harassment. Id. at 1066-68.

III.

Finally, Snell contends that the indictment charging him with attempted bank robbery was invalid.

The new indictment that was returned after his attempted extortion conviction was reversed was labelled a "superceding" indictment. Snell argues that a superceding indictment, like an amended information under Fed.R.Crim.P. 7(e), can be returned before a trial on the merits, but may not be returned after a final judgment, i.e., the reversal of his first conviction.

We reject this hypertechnical argument. Although labeled "superceding", the indictment returned against Snell was in effect a new indictment, not an amended one. Snell presents no authority to suggest that superceding indictments are limited to describing amended indictments, and in fact the word superceding is used to describe serial indictments in a variety of contexts. See, e.g., United States v. Kelava, 610 F.2d 479, 480, 482 (7th Cir. 1979); United States v. Ledee, 549 F.2d 990, 993 (5th Cir.), cert. denied, 434 U.S. 902 (1977). Even if the inclusion of the word superceding was a technical defect, Snell does not show he was prejudiced.

The judgment of the district court is affirmed.

FOOTNOTE

[1]In United States v. La Binia, 614 F.2d 1207 (9th Cir. 1980), this court relying on the Supreme Court's intervening decision in United States v. Culbert, 435 U.S. 371 (1978), overruled the holding in Snell that led to the reversal of Snell's Hobbs Act conviction.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 627 F.2d 186. Two earlier court of appeals opinions are reported at 550 F.2d 515 and 592 F.2d 1083.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1980. The petition for a writ of certiorari was filed on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars prosecution for attempted bank robbery following conviction for attempted extortion and conspiracy to commit bank robbery.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner and co-defendant Erwin Schmidt were convicted of attempted extortion affecting interstate commerce, in violation of 18 U.S.C. 1951, and conspiracy to rob a federally-insured bank, in violation of 18 U.S.C 371 and 2113(a). Petitioner was sentenced to 20 years' imprisonment on the extortion count and five years' imprisonment on the conspiracy count, the terms to run concurrently.

Briefly summarized, the evidence at trial showed that petitioner, Schmidt, and an unindicted co-conspirator attempted to extort $150,000 from a bank in Hayward, California, by devising a plan to kidnap the bank manager's wife and to accompany the manager to the bank in order to obtain the ransom money. The conspirators agreed that the bank manager would be murdered after the ransom had been paid. Petitioner and his cohorts went to the bank manager's house on December 11, 1975, in an attempt to implement the plan, but their scheme was thwarted when the bank manager's wife answered the door with a large and unfriendly dog at her side. United States v. Snell, 550 F.2d 515, 517 (9th Cir. 1977).

On appeal, the court of appeals affirmed the conspiracy convictions but reversed the attempted extortion convictions. The court held that the proof at trial would have supported a charge of attempted bank robbery and that "the bank robbery statute provides the exclusive remedy for conduct within its coverage." United States v. Snell, supra, 550 F.2d at 518.

On remand, petitioner and Schmidt were indicted for attempted bank robbery, in violation of 18 U.S.C. 2113(a).[1/] On petitioner's motion, the district court dismissed the indictment on the ground that retrial for the offense would violate the Double Jeopardy and Due Process Clauses. The government appealed this ruling, and the court of appeals reversed. 592 F.2d 1083. This Court denied certiorari. 442 U.S. 994(1979).

On remand, petitioner waived a jury trial and the case was submitted on the record of the first trial. The district court found petitioner guilty of attempted bank robbery, and the court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioner contends (Pet. 5-7) that the Double Jeopardy Clause prohibits his prosecution for attempted bank robbery following his convictions of conspiracy to commit bank robbery and attempted extortion, because all three offenses arose out of the same criminal transaction. The court of appeals correctly rejected these claims, as it had done previously on petitioner's pretrial appeal. See 592 F.2d 1083.

1. Petitioner's prosecution for attempted bank robbery following his conviction for conspiracy to commit bank robbery does not violate the Double Jeopardy Clause because attempted bank robbery and conspiracy do not constitute the "same offense"

1/ On April 14, 1978, the Assistant Attorney General, pursuant to the Department of Justice's Petite policy (see Rinaldi v. United States, 434 U.S. 22 (1978)), granted authority to the United States Attorney for the Northern District of California to pursue the second prosecution.

for double jeopardy purposes. The classic test for determining whether two separately defined crimes constitute the same offense is whether each provision requires proof of a fact that the other does not. Brown v. Ohio, 432 U.S. 161, 166 (1977); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975); Blockburger v. United States, 284 U.S. 299, 304 (1931).

The court below properly concluded that the Blockburger test was satisfied here: conspiracy requires proof of a criminal agreement, whereas attempted bank robbery (which can be committed by a single defendant) does not; attempted bank robbery, on the other hand, requires proof of acts "tending toward the accomplishment [of a bank robbery] and done in part execution of the design to commit a crime, exceeding an intent but falling short of an execution of it" (United States v. Bussey, 507 F.2d 1096, 1097 (9th Cir. 1973)), whereas conspiracy merely requires proof of an agreement plus a single overt act, which may actually do little to advance the scheme to rob the bank. See Brinkley v. United States, 560 F.2d 871, 874 (8th Cir.), cert. denied, 434 U.S. 931 (1977), upholding convictions for both attempted bank robbery and conspiracy to commit bank robbery.

2. Nor does the fact that petitioner was prosecuted for attempted bank robbery following the reversal of his conviction of attempted extortion offend the Double Jeopardy Clause. Retrial is of course permissible when a conviction has been reversed on grounds that do not implicate the sufficiency of the evidence. Burks v. United States, 437 U.S. 1, 15 (1978); Greene v. Massey, 437 U.S. 19, 26 (1978); United States v. Tateo, 337

U.S. 463, 465 (1964). The fact that the government chose on remand to prosecute petitioner for attempted bank robbery rather than to reprosecute him for attempted extortion is of no consequence. As this Court held in United States v. Ewell, 383 U.S. 116, 124-125 (1966), when a defendant's conviction is reversed and the case remanded for retrial, the government is free to prosecute for the same offense or for a different offense arising out of the same transaction. Accord, United States v. Poll, 538 F.2d 846, 847 (9th Cir.), cert. denied, 429 U.S. 977 (1976). The United States Attorney's decision to proceed under the attempted bank robbery statute was plainly legitimate here since that was the statute the court of appeals had held to be the exclusive remedy for petitioner's undeniably criminal acts.2/

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DECEMBER 1980

2/ More recently, the Ninth Circuit, relying on this Court's intervening decision in United States v. Culbert, 435 U.S. 371 (1978), has overruled its decision in the first Snell case and held that conduct such as petitioner's may be prosecuted under either the bank robbery statute or the Hobbs Act. United States v. LaBinia, 614 F.2d 1207 (1980).